IN RE YAP KIM KEE & SONS SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[COMPANIES WINDING-UP NO. D4-42-242 OF 1988]
20 NOVEMBER 1989

COMPANY LAW: *Winding-up - Application to set aside winding-up order and for stay of proceedings pending final determination of the company's application for further arguments and or further appeal - Allegation that company unable to pay its debt - Just and equitable to be wound-up - Letter of demand - Form - Purpose of letter of demand - Requirements of s. 218(2)(a) - Statutory presumption of insolvency - Whether company unable to pay debts.*

This is an application by Yap Kim Kee & Sons Sdn. Bhd. for an order that the winding-up petition filed against the company be set aside and that all further proceedings be stayed until the final determination of the company's application for further arguments and or further appeal.

The main issue here was whether the company was unable to pay its debt by virtue of s. 218(2)(a) of the Companies Act and consequently whether the notice of demand complied with the requirements of the above said action.

Held:

[1] There is no prescribed form for a letter of demand either in the Companies Act or in the Companies Winding Up Rules 1972.

[2] The purpose of the demand is to warn the debtor of an impending petition. The letter of demand must strictly comply with the requirements of s. 218(2)(a) of the Companies Act 1965.

[3] The demand must be made in writing and signed by the creditor or his authorised agent and it must specify the sum due.

It must also be served at the registered office of the company.

[4] The creditor is also required to state in the notice that the company must pay the sum due within twenty-one days from the date of the service of the demand and failing which the company will be deemed unable to pay its debt and action will be taken to wind-up the company.

[5] No statutory presumption of insolvency will arise from a failure to pay in response to a demand, which was in excess of the amount stated in the petition.

[6] In the circumstances, the letter of demand was bad and the company cannot be presumed to be unable to pay its debts.

The Court will not be prepared to make a winding-up order based on unsatisfied statutory demand.

[7] As the petitioning creditor is unable to invoke the presumption under s. 218(2)(a) and there is no direct evidence to show that the company is unable to pay its debts or that it is insolvent, the winding-up petition is set aside.

[Application allowed.]

Cases referred to:

Bateman Television Ltd. & Anor. v. Coleridge Finance Co. Ltd. [1969] NZLR 794

Re Willes Trading [1977-1978] ACLC 434

W.T. Henley's Telegraph Works Co. Ltd. v. Gorakhpur Electric Supply Co. Ltd. [1936] 23 AIR (Alla) 840

In re Bryant Investment Co. Ltd. [1974] 1 WLR 826

Legislation referred to:

Companies Act 1965, ss. 218(1)(e), (2), (2)(a)
Companies Act 1948 [UK], s. 223(a)
Companies Act 1961 (NSW) [AUST] s.222(2)(a)
Rules of the High Court 1980, O. 14 r. 11

Other sources referred to:

Palmer's Company Precedents Part II (Winding-Up), 17 Edn.
The Law of Company Liquidation, 3rd. Edn. p. 48

For the respondent company - Sukhdev Singh; M/s. Sukhdev Singh & Co.
For the petitioner - J. Kannaperan; M/s. Shearn Delamore & Co.

JUDGMENT

Zakaria Yatim J:

This is an application by a company known as Yap Kim Kee and Sons Sdn. Bhd. (hereinafter referred to as "the company") for an order that (a) the petition to wind-up the company filed on 20 May 1988 be set aside; and/or (b) that all further proceedings be stayed until the final determination of the company's application for further arguments and/or further appeal in respect of the matter in civil suit no. C7521 of 1985. The applicant asks that the costs of the application be costs in the cause.

I shall first deal with prayer (a). In the petition, the petitioning creditor states that the company is indebted to the petitioning creditor in the sum of RM145,000 together with costs of RM350 based on a judgment obtained in the High Court. The petition also states that a demand in writing dated 19 November 1985 for the payment of the said sum was sent to the company's registered office but no payment was made by the company. According to the petition, the company is unable to pay its debt and it is just and equitable that the company be wound-up.

In order to consider prayer (a) it is relevant to see the sequence of events in the civil suit from the time the letter of demand was sent to the company to the time the judgment creditor obtained judgment against the company. Before the writ was issued the petitioning creditor, who was the plaintiff in the civil suit, wrote a letter of demand dated 19 November 1985, to the company which was then the first defendant and one Yap Kim Kee, the second defendant in the civil suit. The letter of demand required the defendants to repay the plaintiff immediately a sum of RM232,000 failing which the plaintiff would institute legal proceedings against the defendants.

On 20 November 1985, the plaintiff filed a writ of summons in the High Court Kuala Lumpur. In the statement of claim, the plaintiff claimed the same amount as stated in the letter of demand, that is the sum of RM232,000. On 28 November, the defendants entered appearance and on 18 December, the defendants filed their defence. On 25 January 1986 the plaintiff filed an application for summary judgment under O. 14 Rules of the High

Court 1980. The application was supported by the affidavit of one Yap Chin Huat, the director of the plaintiff, affirmed on 24 January 1986. In that affidavit the deponent averred that the defendants were at the commencement of the suit truly and justly indebted to the plaintiff jointly in the sum of RM232,000 and interest and costs. According to him by a letter dated 19 November 1985, the plaintiff through its solicitors made demand upon the defendants for the return of the money. He added that despite the demand the defendants failed, refused and neglected to pay the sum claimed. The letter of demand was exhibited to the said affidavit. The second defendant, Mr. Yap Kim Kee affirmed an affidavit on 22 September 1986 opposing the plaintiff's application for summary judgment. In that affidavit the deponent averred that the defendants were surprised to receive the letter of demand. He also averred that the sum of RM145,000 was in fact paid to or received to the use of Mr. Yap Chin Huat and the remaining sums of RM57,000 and RM30,000 paid to or received by other persons best known to the plaintiff or Mr. Yap Chin Huat, its director. The deponent added that the defendants challenged the genuineness of the plaintiff's claim and asked the Court to dismiss the application for summary judgment with costs. On 24 September 1986 the same deponent affirmed an affidavit and stated, *inter alia*, that the defendants had a strong defence to the claim and that the plaintiff's application ought to be dismissed with costs.

On 11 December 1986 when the application for summary judgment came up for hearing before the Senior Assistant Registrar, the defendants and their solicitors were absent, and the Senior Assistant Registrar ordered that final judgment be entered by the plaintiff against the defendants for the sum of RM232,000 pursuant to O. 14 of the Rules of the High Court with interests and costs. The summary judgment entered by the Senior Assistant Registrar is reproduced below:

Judgment

11 December 1986.

The defendants having entered appearance herein and the Court having under O. 14 ordered that judgment as hereinafter provided be entered for the plaintiffs against the defendants.

It is this day adjusted that the defendants do pay the plaintiffs RM232,000 together with interest at 12% per annum from 12 September 1985 to the date hereof and further interest at the rate of 8% per annum from the date hereof to the date of realisation and RM350 costs.

Sgd/-
Senior Assistant Registrar,
High Court, Kuala Lumpur.

On 29 July 1987, the defendants filed an application under O. 14 r. 11 to set aside the above judgment. The defendants also applied for stay of execution proceedings pending the determination of their application. On 18 September 1987 the learned Judge set aside the said judgment. On 12 December 1987, the Senior Assistant Registrar heard the application for summary judgment in the presence of both parties and dismissed the plaintiff's application for summary judgment. The plaintiff filed its notice of appeal against the decision of the Senior Assistant Registrar on 21 December 1987. On 10 February 1988, the learned Judge allowed the appeal and ordered that the plaintiff be at liberty to enter judgment against the defendants for the sum of RM145,000 and RM350 costs and the

balance of the claim and interest to proceed for trial. It was also ordered that the action be transferred to the Sessions Court for the trial in respect of the remaining sum. The judgment of the learned Judge is reproduced below:

Judgment

Pursuant to the order of Court dated 10 February 1988 whereby it was ordered that the appeal be allowed and that the order given on 17 December 1987 by the Senior Assistant Registrar be and is hereby set aside and further order that the plaintiff be and is hereby at liberty to enter judgment against the defendants for the sum of RM145,000 and RM350 costs and with regards the balance of the claim and interest to proceed for trial and that this action be and is hereby transferred to the Sessions Court, Kuala Lumpur.

It is this day adjudged that the defendants do pay the plaintiff the sum of RM145,000 and RM350 costs.

Dated 10 February 1988.

Sgd/-
Senior Assistant Registrar
High Court, Kuala Lumpur.

It was on the basis of this judgment that the plaintiff proceeded with the winding-up proceedings against the first defendant.

In para. 5 of the petition the petitioning creditor referred to the above judgment and stated that the company was indebted to the petitioning creditor in the sum stated in the judgment. The petitioning creditor is asking the Court to make a winding-up order against the company under s. 218(1)(e) of the Companies Act 1965 on the ground that the company was unable to pay its debts. According to the petition, no payment was made by the company after the letter of demand dated 19 November 1985 had been served on it. A copy of the letter of demand is annexed to the petition and marked "C". The said letter of demand is reproduced below:

Messrs Yap Kim Kee & Sons Sdn. Bhd.,
Room 1, 1st Floor,
Lee Rubber Building,
145, Jalan Bandar,

By Hand

And
Wisma Tek Lee, 1st Floor,
38, Jalan Tun Perak,
Kuala Lumpur.

Mr. Yap Kim Kee,
Room 1, 1st Floor,
Lee Rubber Building,
145, Jalan Bandar,
Kuala Lumpur.

Dear Sirs,

Re: Sale & purchase of 14,700 shares in Kepong Development Sdn. Bhd.

We act for Messrs. Tanah Setia Sdn. Bhd.

We are instructed by our clients that our clients wish to purchase the above mentioned shares in Kepong Development Sdn. Bhd. and did pay on the following dates the following sums of money to account of purchase price:

Date	Amount
18 - 22 July 1985	RM 57,000
30 July 1985	RM 30,000
12 September 1985	RM 145,000
	RM 232,000

We are instructed by our clients that despite the fact that the final draft sale and purchase agreement was delivered to yourselves in September 1985, you have failed to complete the sale and have decided not to proceed with the said transaction.

We are therefore instructed by our clients to demand, which we hereby do, the immediate repayment of the sum of RM232,000, failing which, we have our clients' firm instructions to institute legal proceedings against yourselves without any further reference and you will be liable for all the ensuing costs.

Kindly disregard our earlier letter of 18 November 1985.

Your faithfully,

The above letter of demand is the same letter of demand which was sent to the defendants before issuing the writ of summons against them on 20 November 1985.

The Chairman of the company, in his affidavit affirmed on 3 August 1988 averred that para. 6 of the petition stated "that a demand was made on 19 November 1985. Exhibit 'C' in the petition is for the sum of RM232,000." He referred to the judgment dated 10 February 1988 which was for the sum of RM145,000 and averred that "...the notice of demand dated 19 November 1985 is for the sum of RM232,000 which forms the very substratum of the winding up petition is wrong, improper and without any effect in law." The deponent further averred that the petitioning creditor"...had not made any demand up to date for the judgment sum of RM145,000." According to him, "this petition for winding up is premature and ought to be set aside for non compliance with s. 218(2) of the Companies Act 1965."

The petitioning creditor in its affidavit affirmed on 4 October 1988 averred that the basis of the winding up petition was the judgment sum of RM145,000 which was decided by the learned Judge on 10 February 1988. The deponent also averred that "... there is no breach of s. 218(2) of the Companies Act ... as s. 218(2) is a deeming section which requires a demand for a debt due, and "debt due" being a sum exceeding RM500." The deponent went on to state that the "petitioner did by their solicitors make a demand for the debt due by a letter dated 19 November 1985." When the deponent referred to the "debt due" in the letter of demand he must be referring to the sum of RM232,000 as debt due to the petitioning creditor.

Miss J. Kannaperan, Counsel for the petitioning creditor drew the attention of the Court to p. 3 of the petition and submitted that the petitioning creditor had made a demand. She also referred to s. 218(1)(e) and (2) of the Companies Act.

It appears to me, from the petition and the letter of demand attached thereto, from the affidavit evidence and the submission of Counsel for the petitioning creditor, the petitioning creditor is saying that since the company failed to comply with the letter of demand dated 19 November 1985 it was deemed to be unable to pay its debts and accordingly the company should be wound up under s. 218(1)(e).

The company did not dispute that there was a judgment entered against it in the sum of RM145,000 and RM350 costs.

The main issue here is whether the company is deemed to be unable to pay its debt by virtue of s. 218(2)(a). The section states:

> (2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

There is no prescribed form for a letter of demand either in the Companies Act or in the Companies (Winding-Up) Rules 1972. *Palmers's Company Precedents Part II (Winding-Up)* 17 Edn., in a commentary on s. 223(a) of the English Companies Act 1948, which is almost identical to our s. 218(2)(a), states that the demand in writing need not be in special form. I do not dispute the view expressed in *Palmer's Company Precedents, supra.*, but it must be borne in mind that the purpose of the demand is to warn the debtor of an impending petition. *Bateman Television Ltd. & Anor. v. Coleridge Finance Co. Ltd.* [1969] NZLR. 794 @ 803.

The letter of demand must strictly comply with the requirements of s. 218(2)(a). *Re Willes Trading* [1977-1978] ACLC 434. J. O'Donovan, *The Law of Company Liquidation* 3rd. Edn., p. 48. See also *W.T. Henley's Telegraph Works Co. Ltd. v. Gorakhpur Electric Supply Co. Ltd.* [1936] 23 AIR (Alla) 840. In *Re Willes Trading supra*, Needham J of the Supreme Court of New South Wales stated in his judgment that "The deeming effect of the notice...arises only if the notice is in full compliance with the conditions set out in the section itself..." Needham J was referring to s. 222(2)(a) of the Companies Act which is identical to our s. 218(2)(a). I respectfully agree with the view expressed by Needham J.

Accordingly the demand must be made in writing and signed by the creditor or his authorised agent, and it must specify the sum due. The demand must be served at the registered office of the company. See J. O'Donovan, *The Law of Company Liquidation, supra* pp. 48 and 49. The normal practice is for the creditor to also state in the notice (1) that the company must pay the sum due within twenty-one days from the date of the service of the demand and (2) failing which the company will be deemed unable to pay its debt and action will be taken to wind-up the company.

As already stated, the letter of demand relied upon by the petitioning creditor in the petition was the letter of demand dated 19 November 1985. Firstly, it was a letter of demand sent to the company before the petitioning creditor instituted the civil suit on 20 November 1985. The amount stated in the letter of demand was disputed by the defendants at the O. 14 stage. Secondly, the letter was not signed and it was not stated who were the solicitors who wrote the letter. Thirdly, the letter demanded "immediate repayment." This is contrary to s. 218(2)(a) which provides that payment must be made within three weeks after the service of the letter of demand. Fourthly, the letter threatened

to institute legal proceedings against the company and one Yap Kim Kee and not a winding-up proceeding. Fifthly the amount demanded in the letter was RM232,000 which was greater than the amount stated in the petition, that is RM145,000 together with costs of RM350. No statutory presumption of insolvency will arise from a failure to pay in response to a demand, which was in excess of the amount stated in the petition. See J. O'Donovan, *The Law of Company Liquidation, supra*.

In the circumstances the letter of demand dated 19 November 1985 was bad and the company cannot be presumed to be unable to pay its debts. Indeed the Court will not be prepared to make a winding-up order based on unsatisfied statutory demand. In *re Bryant Investment Co. Ltd.* [1974] 1 WLR 826.

Since the petitioning creditor is unable to invoke the presumption under s. 218(2)(a), the question is whether there is direct evidence to show that the company is unable to pay its debts or it is insolvent. I have examined all the affidavits and the documents exhibited thereto and I find that there is no such evidence.

For the reasons stated above, the petition is set aside. The costs of this application shall be costs in the cause. With regard to prayer (b) the company is in fact asking for a stay of the winding-up proceeding. This is stated in para. 4 of the company's affidavit affirmed on 3 August 1988. Para 4 states:

> I am also to state that in the alternative, this petition for winding-up and all proceedings thereafter ought to be stayed in the interest of justice...

Since the petition has been set aside the question of stay of the winding-up proceeding does not arise.

Also found at [1990] 1 CLJ 495